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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1420

In re MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

vs.

JOHN C. RISJORD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

HARVEY M. GROSSMAN,
5900 Wilshire Boulevard, Suite 1470,
Los Angeles, Calif. 90036,
(213) 934-1133,
Attorney for Petitioner.

Of Counsel:
WILLIAM FREIVOGEL,
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS,
One IBM Plaza, Suite 3100,
Chicago, Illinois 60611,
(312) 467-9300,
and

WILLIAM H. SANDERS,
BLACKWELL, SANDERS,
MATHENY, WEARY
& LOMBARDI,
Five Crown Center, Suite 600,
2480 Pershing Road,
Kansas City, Missouri 64108,
(816) 474-5700.

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Respondent's Brief in Opposition raises certain arguments which warrant a brief reply.[1]

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[1]As in our petition we shall refer to John C. Risjord, appellee below and respondent here, as "Risjord"; to Niewald, Risjord & Waldeck, the law firm of which he is a member, as the "Risjord firm"; to appellant The Firestone Tire & Rubber Company, appellant below and petitioner here, as "Firestone"; to The Home Insurance Company, Firestone's insurer and a client of Risjord and the Risjord firm, as "Home"; and to certain personal injury plaintiffs represented by Risjord and the Risjord firm in this multi-district litigation as the "Risjord Plaintiffs". Record references (designated "R., p. ..." or "Risjord Dep., p. ...") are to the Record in the Court of Appeals. Appendix references (designated "App. ..., p. ...") are to the appendices to the Petition.

The Appealability Issue in This Case Is a "Live" One Suitable for Adjudication.

Contrary to Respondent's assertions, the basic question posed by Firestone's Petition — *i.e.*, whether an order denying a motion to disqualify counsel is a final decision in a collateral matter so as to qualify for appeal pursuant to 28 U.S.C. §1291 under the "collateral order" doctrine — is indeed a "live" one in this case.

Certainly the Court of Appeals regarded it as such, as evidenced by the fact that it deemed the question worthy of *en banc* consideration.

Nor is there any real doubt that the Court of Appeals decided the question, in what that Court expressly describes (App. B, p. 9) as a "holding", as evidenced by the following language: "We have reconsidered *Weber* and *Dean Foods* and now agree with the position of the District of Columbia, Sixth and Ninth Circuits; it is the opinion of this court that *Weber* and *Dean Foods* should be and hereby are overruled." [Footnote omitted]

Consistent with the "case or controversy" requirement of Article III of the Constitution, the Court of Appeals' ruling of non-appealability (upon which it predicated the overruling of its prior cases) necessarily precluded it from giving meaningful consideration to the merits of the present case. Moreover, as a practical matter the court's determination of non-appealability necessarily foreclosed the court from reversing the trial court, for to do so would have undermined the appellate court's position in declining to entertain such appeals in the future. Nor is it conceivable that absent such considerations the appellate court would have disposed in so casual a fashion of substantive issues which the trial court itself found to be substantial and appeal-worthy. (App. A. p. 5; R. p. 292).

In short, the Court of Appeals' holding of non-appealability necessarily has had a profound impact upon the course of the action, depriving Firestone of any real "day in court" at the appellate level, and is therefore very much a "live" issue in the case. Conversely, review of the Court of Appeals' holding by this Court would in no way be "advisory".

Indeed, inasmuch as the Eighth Circuit, based on its holding in this case, now deems the matter a closed issue, unless review is granted here it is likely that this Court never will have a case from that Circuit in which to address the question.

Thus, Respondent's professed disinterest in the appealability issue appears to stem not from the issue's alleged lack of viability but from the fact that Respondent, having prevailed on the issue below and thereby effectively deprived Firestone of any meaningful appellate review, would like to see the matter put to rest.

Nor is the present case akin to that in *S. S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), cited by Respondent, where the Court's construction of a bill of lading disclosed that the case did not actually pose the question the Court had sought to review.

Respondent's Assertions as to the Alleged Frequency of Such Appeals Argues for, Not Against, Review by This Court.

Even if we accept; *arguendo,* Respondent's claim that there has been a "flood of appeals" from rulings on motions to disqualify, this actually argues for, not against, the review which Firestone seeks, inasmuch as it points up the importance of a definitive resolution of the issue of appealability — a resolution which can come only from this Court.

Nor does the present state of the authorities — in which a majority of the circuits addressing the question have opted for

appealability, while others have "backed and filled" on the question — support Respondent's suggestion that the Courts of Appeals are "resolving" the question.

Neither is it any answer for Respondent to suggest the possibility of review by extraordinary writ or other special procedures, for the adequacy or inadequacy of such procedures is the very question which has divided the circuits.

Respondent's Challenge to Firestone's Standing Is Frivolous.

Respondent challenges Firestone's "standing" — a point not even raised in the trial court nor relied on by the Court of Appeals. In light of Firestone's obvious interest in avoiding the dangers posed by permitting an attorney linked to its insurer Home to control the course of lawsuits in which Home is seeking to avoid coverage, this belated challenge appears frivolous.

No Need to Resolve "Factual Disputes".

Contrary to Respondent's assertion, the danger that an attorney linked to an insurer might be influenced by coverage considerations in his handling of a personal injury suit — particularly in a context where the insurer is disclaiming coverage — does serve to "taint" the proceedings. Nor does this clearcut question give rise to the kinds of factual disputes to which Respondent refers (*e.g.*, whether the subject matters of the litigation are "related" — an extraneous question here — or whether collusion actually occurred). Indeed, the basic flaw in the trial court's approach stemmed not from a failure to find the conflict but from a failure to address the full implications of that finding or to take meaningful corrective action — a task for which this Court is equally well suited.

The Disqualification Proceedings Have Not Delayed the Action and Risjord's Suggestion of Harassment Is Unfounded.

While Respondent suggests that the disqualification proceedings have served to delay the prosecution of the case, actually Firestone has not sought to delay discovery pending the resolution of that question. Moreover, the trial court found that "an immediate appeal from [its] ruling may *materially advance* the ultimate termination of [the] litigation" (App. A, p. 5; R. p. 292). (Emphasis added).

The simplest answer to Risjord's claim that Firestone's motion to disqualify him is merely designed for harassment is that the trial court itself not only found Firestone's concerns to be well taken but took pains to endorse Firestone's present appeal and the substantiality of the question it poses. (App. A, p. 5; R. p. 292). Moreover, the uncontradicted facts of record attest to the legitimacy of Firestone's concerns.[2]

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[2]Risjord's suggestion that Firestone was dilatory in raising the conflict issue — a point Risjord first urged on appeal — likewise is unfounded.

In essence, Risjord contends that Firestone should have known of Risjord's relationship to Home at the time he filed suit on behalf of the Risjord Plaintiffs because William Sanders (Firestone's liaison counsel in this multi-district litigation) had been engaged by Risjord's error and omissions insurer some years ago to defend Risjord against a libel charge asserted against Risjord in the *Cannova* suit (The libel claim was disposed of by summary judgment). (Risjord Dep., p. 104). There is no suggestion Mr. Sanders had been aware of the continuing and deep-rooted nature of the Home-Risjord relationship. Nor does Risjord suggest wherein Firestone could be charged with knowledge allegedly acquired by Mr. Sanders in another context. Moreover, the multi-faceted conflict in which Risjord was involved could not have become apparent prior to the time Home disavowed liability to Firestone on the intentional tort claims of the Risjord Plaintiffs. And Risjord's own delay in urging the point and his failure to demonstrate any prejudice militate against it in any event. Nor are laches claims lightly entertained in the present context, given the public interest considerations involved. See, *e.g.*, *Arkansas v. Dean Foods Products Company, Inc.*, 605 F.2d 380, 384 (8th Cir. 1979) (claim of laches rejected, court noting that "[disqualification is an ethical, not a legal matter [citing case] and is in the public's, as well as the client's, interest"]); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) (three-year delay not fatal).

Home's Purported Discharge of Risjord in Cannova Does Not Aid Respondent's Position Here.

As for Home's purported discharge of Risjord in the *Cannova* case, since the Court of Appeals does not even mention that fact, let alone rely on it, we need not discuss it at length here. Risjord's purported divorcement from *Cannova* is by no means complete; Risjord remains as counsel for the other defendants in *Cannova*, in which role he is still in a position to serve Home's interests in that case (R. p. 437). Viewed in terms of an "appearance of impropriety", the "withdrawal" is more cosmetic than real. But even assuming, *arguendo*, that Risjord were totally divorced from *Cannova* (which is not the fact), that would not be a meaningful cure, since the relationship between Risjord and Home is deeply rooted and far transcends Risjord's involvement in *Cannova*. Nor would Risjord be unaware that his firm's potential future business with its longstanding client, Home, might well depend on the extent his actions tended to aid or hinder Home's efforts to defeat coverage on the claims of the Risjord Plaintiffs.

A True Concern for Plaintiffs' Rights Dictates That Risjord Be Disqualified.

Risjord's professed concern for plaintiffs' rights appears misplaced. For the danger that Risjord will guide the cases so as to further (or at the very least so as not to hinder) the efforts of his client Home to defeat coverage poses a threat not only to Firestone but also to the Risjord Plaintiffs, who are entitled to representation by counsel whose loyalty is not impaired by such considerations. Stated otherwise, what ought to concern this Court is not the fact that plaintiffs selected Risjord (and, being insufficiently sophisticated or informed to appreciate

the dangers, may have acquiesced in his retention), but the fact that Home, whose motives are hardly above suspicion, is demonstrably eager to have him in the case.

In short, the real dichotomy in these proceedings lies not between Firestone and plaintiffs, but between Risjord and Home on the one hand, and on the other hand Firestone, the plaintiffs, and the need to protect the public confidence in the judicial system. The choice between those interests cannot admit of serious doubt.

Conclusion.

Respondent's Brief fails to negate the need for certiorari and accordingly Petitioner again urges that certiorari be granted as prayed.

Respectfully submitted,
HARVEY M. GROSSMAN,
Attorney for Petitioner.

Of Counsel:
WILLIAM FRIVOGEL,
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS,
and
WILLIAM H. SANDERS,
BLACKWELL, SANDERS, MATHENY,
WEARY & LOMBARDI.